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Nos. 81-2245, 81-2276 and 82-38

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

STATE OF NEVADA,
Petitioner,
vs.
UNITED STATES OF AMERICA, et al.

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,
vs.
UNITED STATES OF AMERICA, et al.

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Cross-Petitioner,
vs.
TRUCKEE-CARSON IRRIGATION DISTRICT, et al.

On Writs of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF OF RESPONDENT SIERRA PACIFIC POWER COMPANY

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QUESTION PRESENTED

Whether the final judgment in a water rights action to which all water users on the Truckee River and its tributaries in Nevada were parties and in which the implied reserved right to a specific quantity of water for the Pyramid Lake Indian Reservation was litigated and established bars a later action claiming an implied reserved right to a larger quantity of water?

LIST OF PARTIES

The United States was plaintiff and appellant below. The Pyramid Lake Paiute Tribe of Indians intervened as a plaintiff and was also an appellant. The defendants and appellees were the Sierra Pacific Power Company,* the Truckee-Carson Irrigation District (in its own right and with others as class representatives of reclamation project rightholders), the State of Nevada, the County of Washoe, the Cities of Reno and Sparks, and approximately 17,000 named persons, firms, partnerships, and corporations located in the State of Nevada. Nevada has filed a list of the approximately 17,000 defendants in this case with the Clerk of the Court. Nev. Pet. No. 81-2245 at ii n.*.

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*Sierra Pacific Power Company is a publicly held corporation listed on the New York Stock Exchange. It has no subsidiaries which are not wholly owned and has no affiliates.

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RELEVANT CONSTITUTIONAL PROVISIONS

No Constitutional provisions are directly involved.

STATEMENT OF THE CASE

The State of Nevada (Nevada) in No. 81-2245 and the Truckee-Carson Irrigation District (TCID) in No. 81-2276 have provided the Court a detailed statement of the case. Set forth below, therefore, is a short statement of what Sierra Pacific Power Company (Sierra Pacific) is and what its interests are in this action. Important facts bearing directly on legal issues are set forth in the argument on those issues.

Sierra Pacific is a Nevada corporation and the successor to The Truckee River General Electric Company. 42 Tr. 8378.[1] It was a party to *United States v. Orr Water Ditch Co., et al.*, Equity No. A-3 (D.Nev.1944) (*Orr Ditch*). Ex. A-99003 (Nev. App. 2a); Ex. A-99001 (Nev. App. 17a-150a). It is a public utility engaged principally in the generation, purchase, transmission, distribution and sale of electric energy in the States of Nevada and California. It is also engaged in the purchase, transmission, distribution and sale of water and gas in the Cities of Reno and Sparks, Nevada, and in Washoe County, Nevada. 42 Tr. 8379.

Sierra Pacific has four hydroelectric facilities on the Truckee River in both Nevada and California. 42 Tr. 8385; 27 R. 5649. The water used to operate those facilities was decreed as claims 5, 6, 7 and 8 in *Orr Ditch*. Ex. A-99001 at 11 (Nev. App. 61a-64a). The priority dates on those claims are 1899, 1904, 1909 and 1902 respectively. *Id.* Those

[1]The symbols and abbreviations used in this Brief are as follows: "Tr." refers to the transcript of proceedings. "R." refers to the Clerk's record on appeal. References to the Clerk's record on appeal and to the transcript of proceedings include both volume and page number. "Nev. App." refers to the Appendix to Nevada's Petition for Writ of Certiorari in No. 81-2245. "JA" refers to the Joint Appendix filed by all parties in Nos. 81-2245, 81-2276 and 82-38. "Ex." refers to an exhibit received in evidence.

hydroelectric facilities are utilized by Sierra Pacific to meet the base load requirements of its generating system.[2] 42 Tr. 8385; 27 R. 5650.

Sierra Pacific also generates electricity by means of steam units at the Tracy Generating Station on the Truckee River a few miles above Derby Dam. 42 Tr. 8385; 27 R. 5652. It has purchased 3,969 acre feet of *Orr Ditch* irrigation rights and changed their manner and place of use to industrial use at the Tracy Generating Station.[3] 42 Tr. 8388; 42 Tr. 8386; 27 R. 5722; 5728; *see also* 42 Tr. 8385; 27 R. 5640 and attached schedule.

The *Orr Ditch* Final Decree granted Sierra Pacific 29,200 acre feet per year from the Truckee River (Highland Ditch) for municipal purposes in Reno and Sparks, Nevada. 42 Tr. 8388; 27 R. 5722; 5728; Ex. A-99001 at 19-20 (Nev. App. 74a-75a). It also granted Sierra Pacific 9,537 acre feet per year for the same purposes out of Hunter Creek. *Id.*; Ex. A-99001 at 84 (Nev. App. 139a). In addition, Sierra Pacific has purchased *Orr Ditch* irrigation rights totalling 25,468.32 acre feet and has changed their use to municipal. 42 Tr. 8388; 8386; 27 R. 5722; 5728.

In 1974, the City of Reno had an estimated population of 80,408. 20 R. 4253; 42 Tr. 8417. In 1975, the population of Sparks was estimated to be 33,800. 20 R. 4260.[4] As of January 31, 1975, Sierra Pacific had 33,580 customers receiving water from the Truckee River watershed. It served approximately 130,000 residents with water at that time. 42 Tr. 8385; 27 R. 5634. Approximately 4,000 acre

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[2]A generating plant used to meet base load requirements is one, which by comparison with other plants, generates less expensive energy. Such plants are operated at a constant output.

[3]The general provisions of the *Orr Ditch* Final Decree permit changes in "the place, means, manner or purpose of use" of the water. *Orr Ditch* Final Decree, Ex. A-99001 at 88 (Nev. App. 149a).

[4]By 1980 the population of Reno and Sparks had grown to 100,756 and 40,780 respectively. Bureau of Census, U.S. Dept. of Commerce, Census of Population, Nevada (1980).

feet per year is also used by 37 customers of Sierra Pacific for irrigation of farmland along the route of the Highland Ditch. 42 Tr. 8385; 27 R. 5636.

The additional quantity of water the Tribe seeks here would be prior to nearly every other right on the Truckee River, including all of the rights relied upon by Sierra Pacific to provide electricity and water to the residents of Western Nevada. In dry years the water the Tribe seeks would take the entire flow of the River.

SUMMARY OF ARGUMENT

In 1944, after nearly 31 years of litigation, a Final Decree was entered in the *Orr Ditch* litigation. That decree established the water rights of all water users on the Truckee River and its tributaries in Nevada, including the implied reserved right of the Pyramid Lake Indian Reservation. In this action, filed on December 21, 1973, the Tribe now seeks to increase that reserved right more than tenfold. The courts below correctly held that, as to *Orr Ditch* defendants, their successors and subsequent appropriators, the Tribe's attempt to have its reserved water right redetermined is barred by the doctrine of claim preclusion.

A final judgment bars the relitigation of a claim or cause of action or any part thereof. There is and can be only one cause of action for an implied reserved water right. That cause of action is established by proof of the fact, the date and the purpose of the federal reservation. No other facts are needed and no other facts matter.

The most comprehensive test for determining the identity of causes of action is contained in the American Law Institute's Second Restatement of the Law of Judgments. The Restatement Second test is based on a policy oriented, "transactional" view of what constitutes a cause of action or claim. The claim is defined by the facts which constitute the "transaction" which gives rise to it. Those facts

are naturally related in time, space, origin or motivation, they form a convenient trial unit, and their treatment as a unit conforms to the parties' expectations or business understanding or usage.

The Tribe's claim for water to fulfill an alleged fishery purpose is inescapably part of the same transaction as a claim for water to fulfill the purposes of reservation generally. The fact and the 1859 date of reservation are the same. The alleged fishery purpose necessarily is at least "related" to any other purpose or purposes for which water was impliedly "reserved" to the Pyramid Lake Indian Reservation. Because of the factual overlap, it would have been undeniably "convenient" to determine the quantity of water needed to fulfill all of the purposes of reservation at the same time.

Finally, and perhaps most importantly from a policy standpoint, all of the participants in *Orr Ditch* expected and intended that *Orr Ditch* be a final adjudication of all then existing claims to the waters of the Truckee River, including all the Tribe's claims. That expectation was generated by the nature of the action, the priority date basis for determining appropriative and reserved rights and by the conduct of the parties as well as of the court. The complaint filed by the United States was all-inclusive. While the action was pending, on motion by the United States, the court ordered that all parties would be deemed bound as against all others without the necessity of filing formal cross-complaints.

The respective water rights were preliminarily determined and set forth in a temporary restraining order for the purpose of thoroughly testing the operation of the Truckee River system under those rights. The temporary restraining order was in effect for 18 years, during which time any person affected by the proceedings could have applied for relief to the court. When the Final Decree was entered, it "forever enjoined and restrained" the parties

from "claiming any rights in or to the waters of the Truckee River or its tributaries" except those rights "specified, determined and allowed" by it. The Court's words declaring the finality of the decree were as clear as our language affords.

Other tests for determining identity of causes of action such as the "same evidence" test produce the same result. The Tribe's claim is barred. The evidence that matters is the same here as in *Orr Ditch:* the fact, date and purpose of the Reservation. The only new or different evidence the Tribe offers is directed to the quantity of water, part of the remedy not the claim. A difference in the evidence necessary to prove the relief does not create and never has created different causes of action.

In *Orr Ditch,* the United States, pursuant to Congressional authorization, represented both the Newlands Reclamation Project and the Tribe. Until Congress determines otherwise, the United States is the proper party to protect all implied reserved water rights, including those set aside for Indian tribes. There was nothing unusual, improper or inadequate about the United States' dual representation in *Orr Ditch.* Most *Orr Ditch* defendants were represented by counsel who also represented other defendants.

The size of the Tribe's implied reserved right adjudicated in *Orr Ditch* was the product of vigorous and successful representation by the United States. The agricultural nature of that right reflected the overriding contemporary national purpose of teaching the Indians the pursuits of agriculture and animal husbandry.

The Tribe, through its trustee the United States, had adequate notice and opportunity to litigate all the issues and claims encompassed by *Orr Ditch.* Any due process claim of the Tribe based upon inadequate notice and opportunity to be heard arises from the Tribe's inadequate notice of, and opportunity to be heard on, decisions reached inside the United States Government.

If the Tribe's claim exists at all, it is against the United States. The remedy it seeks here, however, runs not against the United States but against the *Orr Ditch* defendants, their successors and subsequent appropriators, innocent persons who have relied, and who continue to rely, on the *Orr Ditch* decree. They neither participated in nor were aware of any breach of duty by the United States. It is the established rule that, in the absence of fraud or collusion between the trustee and the adverse party, neither the faithless trustee nor the injured beneficiary can shift the beneficiary's losses to the adverse party.

The rule of claim preclusion expresses and enforces the policies of finality and stability of judicial decisions. Circumstances could not be invented which so clearly demand application of the rule based upon its underlying policies. The *Orr Ditch* litigation, which began in 1913 and ended in 1944, involved the determination not only of property rights, but of interrelated rights to water, allocated by priority date out of a source which at times is insufficient to satisfy all the rights. The expectation and the necessity that all existing claims be asserted and adjudicated in *Orr Ditch* cannot be overstated.

Claim preclusion is not only a rule of finality and the economic use of judicial resources; it is also a rule of fairness. In the 40 years since *Orr Ditch* the United States and the thousands of defendants, their successors and subsequent appropriators have lived by the Final Decree as their water Bible. They have made the Truckee River watershed and the Newlands Project the center for population, industry, agriculture, business and education in Western Nevada. Since entry of the Final Decree, the population of the cities of Reno and Sparks has grown from 26,635 in 1940 to nearly 150,000 in 1980. Billions of dollars have been spent on homes, plants, agriculture, schools, parks, playgrounds and water distribution facilities, to name just a few.

The *Orr Ditch* parties had no reason to doubt the finality or completeness of the Final Decree. Their reliance was justified and they are entitled to the enforcement of that decree. The relitigation of rights determined by *Orr Ditch* must be held barred to protect the legitimate reliance interests of the parties here and to assure others in similar circumstances that their reliance interests will be protected as well.

ARGUMENT

I

THE CLAIM OF THE TRIBE TO A QUANTITY OF WATER SUFFICIENT TO FULFILL THE ALLEGED FISHERY PURPOSE OF THE PYRAMID LAKE INDIAN RESERVATION IS BARRED BY ORR DITCH.

A. The Cause of Action Here—for a Quantity of Water Sufficient to Fulfill the Alleged Fishery Purpose of the Pyramid Lake Indian Reservation—Is Part of the Same Cause of Action Litigated in Orr Ditch.

1. Introduction.

The rule of claim preclusion[5] is set forth most succinctly in the Restatement (Second) of Judgments (1982) (hereinafter sometimes cited as the "Restatement Second").[6] A valid and final judgment extinguishes a claim which is defined as "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Restatement Second at § 24(1). The factual grouping or groupings which constitute a "transaction" is "to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial

[5]For clarity res judicata is referred to herein as "claim preclusion" and estoppel, both collateral and direct, is referred to as "issue preclusion." "Claim" and "cause of action" are used interchangeably.

[6]The Restatement (Second) of Judgments was published in 1982 after the Court of Appeals decision in this case. While there are no

unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Id.* § 24(2).

In emphasizing a natural grouping of operative facts, the Restatement Second definition incorporates the focus of earlier tests developed by the courts for determining identity of causes of action. *See, e.g., United States v. The Haytian Republic*, 154 U.S. 118, 125 (1894) (the "same evidence test"); *Schuykill Fuel Corp. v. B & C Nieberg Realty Corp.*, 250 N.Y. 304, 165 N.E. 456, 457 (1929) (the "impairment of rights test"). The test developed by the Restatement, however, has the added advantage of giving express consideration to the public policy bases for claim preclusion. Proper concern is given to the scarcity of judicial resources by considering whether the facts form a convenient trial unit. Equally important is the attention given to the courts' role as ultimate arbiters of disputes by examination of the expectations of the parties.[7]

2. The Facts Essential to the Claim in Orr Ditch and Here Arose at the Same Time, Relate to the Same Space and Have the Same Origin.

The Complaint in *Orr Ditch* was filed by the United States on March 3, 1913 (Ex. A-99004), and on July 25,

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significant substantive differences between the tentative drafts relied upon by the Court of Appeals and the final version, the organization and numbering of the sections were changed. All references in this Brief to the Restatement (Second) of Judgments are to the final publication.

[7] The result under the Restatement approach does not turn on "whether the plaintiff has good reasons for not having asserted the claim in the prior suit" and the cases relied upon by the Tribe do not so hold. In Brown v. Felsen, 442 U.S. 127 (1979), a party with a state court judgment was not precluded from meeting a bankruptcy defense. This Court noted that the finality of the prior judgment was not under attack and that to prevent a party from meeting a new defense in that case would defeat, rather than promote, confidence in judgments. In Sea-Land Services v. Gaudet, 414 U.S. 573 (1974), this Court found that a widow's suit for

1914, an amended complaint was filed.[8] Ex. A-99003 (Nev. App. 2a-11a). Both the original and amended complaints sought substantial amounts of water for the Newlands Reclamation Project and the Pyramid Lake Indian Reservation.[9] Ex. A-99003 at 24 (Nev. App. 2a-11a).

The claim for the Pyramid Lake Indian Reservation was set forth in Paragraph 16 of the Amended Complaint. There, the United States alleged the fact, date and purpose of reservation, as well as the legal significance of those facts. *Id.* at 21-24 (Nev. App. 6a-8a).[10] The United States also alleged that an action of the magnitude of *Orr Ditch* was necessary so that a decree could be entered to determine the rights of the parties, including the United States, to the waters of the Truckee River and its tributaries in Nevada. *Id.* at 26-27 (Nev. App. 9a).

Nearly identical allegations concerning the fact, date and purpose of reservation and their legal significance were

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wrongful death under federal maritime law involved a cause of action separate from the decedent's suit for personal injuries. Issue preclusion was applied to prevent relitigation of issues common to both causes of action.

[8]In concluding that claim preclusion applies and that no legally sufficient exception to it was present in this case, the District Court made numerous findings of fact. The Court of Appeals applied the "clearly erroneous" standard to those findings. Where there were mixed findings of law and fact, the Court of Appeals independently reviewed the evidence and assessed those findings. Nev. App. 214a. In no instance did the Court of Appeals disagree with the District Court's findings. This Court will not disturb the concurrent findings of the courts below unless they are shown to be clearly erroneous. Faulkner v. Gibbs, 338 U.S. 267, 268 (1949); Blau v. Lehman, 368 U.S. 403, 409 (1962).

[9]Nevada has provided a detailed statement of the history of the *Orr Ditch* litigation. *See* Brief of Petitioner, No. 81-2245 at 4-19.

[10]In relevant part, paragraph 16 reads:

> On or about or prior to the *29th day of November, 1859*, the Government of the United States, . . . being *desirous of protecting* [the Pyramid Lake Paiute Indians] and their descendants in their homes, fields, pastures, *fishing* and their use of

made in this action. *See* Nev. App. 153a-154a; JA 10-12. Similar allegations were also made as to why an action of this magnitude was needed. Nev. App. 151a-152a; JA 9-10.

Those common allegations of the fact, date and purpose of reservation make up a cause of action for an implied reserved water right for any federal reservation, whether it be a national forest, a national monument, an Indian reservation or some other federal enclave. As this Court noted in *Cappaert v. United States*, 426 U.S. 128 (1976),

> [W]hen the Federal Government withdraws its land from the public domain [the fact of reservation], and reserves it for a federal purpose [the purpose of reservation], the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of reservation [the priority date] and is superior to the rights of future appropriators.

Id. at 138; *see also Colorado River Water Conservation District v. United States*, 424 U.S. 800, 805 (1976); *United States v. District Court for Eagle County*, 401 U.S. 520, 522-23 (1971); *Arizona v. California*, 373 U.S. 546, 601 (1963); *Winters v. United States*, 207 U.S. 564 (1908).

> said lands and waters . . . did *reserve* said lands from any and all forms of entry or sale and for the sole use of said Indians, and for their benefit and civilization.

Ex. A-99003 at 21-22 (Nev. App. 6a) [Emphasis added.]. The United States further alleged:

> The United States by *setting aside* said lands for said *purposes* and *creating* said reservation . . . did . . . *reserve* from further appropriation, appropriate and set aside for its use in, *on*, and *about* said Indian Reservation, . . . from and of the waters of the said Truckee River five hundred (500) cubic feet of water per second of time.

Ex. A-99003 at 23-24 (Nev. App. 7a) [Emphasis added.].

The facts essential to the claim in *Orr Ditch* and here arose at the same time and have the same origin, *i.e.*, "the executive actions by which the Reservation was established and the intent that motivated those actions." Nev. App. 225a. The priority date depends on the same evidence. The essential facts relate to the same space, *i.e.*, the water is "appurtenant to the same reservation," and comes from the same source. *Id.* In both cases, the claims are asserted against and are adverse to the very same water rights.

The ultimate issue in every claim for reserved water for a federal reservation is what quantity of water, if any, the United States reserved out of the stream in question when it set aside the federal reservation. *Cf. United States v. New Mexico*, 438 U.S. 696, 698 (1978). The issue is one of implied intent and in every case requires careful examination of both the "asserted water right" and the "specific purposes for which the land was reserved." *Id.* at 700. Only a single quantity of water is reserved. There is no basis in law or in fact for seriatim actions each separately determining a quantity of water for each different purpose of single federal reservation.[11]

The Tribe attempts here to expand the quantity of its implied reserved right by placing new and special emphasis on the alleged fishery purpose of the Pyramid Lake Indian Reservation. To prove the purpose of reservation is necessarily to prove both the agricultural purpose and the alleged fishery purpose. The purpose of the Pyramid Lake Reservation and the quantity of water reserved have already been adjudicated. The facts here are not only "re-

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[11]As is discussed *infra* at 12-13, sound policy requires that the whole quantity of water to which a federal reservation is entitled under the implied reservation doctrine be claimed and litigated in a single proceeding.

lated in time, space, origin and motivation" to those of *Orr Ditch*. They are the same.[12]

3. The Facts in Orr Ditch and Here Form a Convenient Trial Unit.

The same key facts in each case form the same convenient unit for trial purposes. Treating those facts as forming anything other than a single trial unit violates the principles announced by this Court in *United States v. New Mexico*, 438 U.S. 696 (1978). There, this Court emphasized that each time it has applied the implied reservation of water doctrine it has carefully examined both the asserted water right and the specific purposes for which the land was reserved. 438 U.S. at 700. In addition, this Court held that "where water is only valuable for a secondary use of the reservation" the United States must acquire water "in the same manner as any other public or private appropriator." *Id.* at 702.

In order properly to determine an implied reserved water right, all reservation purposes must be simultaneously examined, both for a determination of whether water is needed to fulfill that purpose and for a determination of which purposes are primary and which purposes are secondary. A court cannot possibly know which purposes are primary and which purposes are secondary and whether water for one purpose is inconsistent with water for another purpose without considering all purposes. *See United States v. New Mexico*, 438 U.S. at 711-12; 715.

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[12]Admittedly, the evidence necessary to quantify the water needed to sustain the fishery is different from the evidence necessary to quantify the water needed for irrigation. However, that difference is not determinative for claim preclusion. It is simply proof of a different remedy. *See* Restatement Second at § 25(2) and comment f at 214; *see also infra* at 34-35.

Under *New Mexico,* all purposes for a federal reservation must be litigated when a claim is made for any one purpose.

All of the facts surrounding the creation of a reservation therefore form the only convenient trial unit. If the United States may file seriatim actions for an implied reserved water right for each separate purpose of a single federal reservation, the problems for the arid West would multiply geometrically. No decree, including any entered here, would be reliable. The objective of an adjudication, to determine and settle water rights, would be unattainable. *See Green River Adjudication v. United States,* 404 P.2d 251, 252 (Utah 1965); *cf. Colorado River Water Conservation District v. United States,* 424 U.S. 800, 810-11 (1976).

The Tribe argues that the facts do not form a convenient trial unit because "having initiated the *Orr Ditch* case on behalf of the water users on the Newlands Project, it would have been improper for the United States to have asserted a conflicting claim on behalf of the Pyramid Lake Indians." Tribe's Brief at 27.[13] The Tribe also contends

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[13]It should be noted that the United States asserted, litigated and obtained an implied reserved right for the Reservation which is adverse to the Newlands Project right. *Compare* para. 8 of Ex. A-99003 (Nev. App. 4a-5a) *with* para. 16 (Nev. App. 7a-8a) and Claim Nos. 3 and 4 Ex. A-99001 (Nev. App. 59a-61a) *with* Claim Nos. 1 and 2 (Nev. App. 57a-58a). As the United States alleged, "in seasons of scarcity and at times of low water the waters of said river and its tributaries are insufficient to supply the claims of all the claimants thereto or the parties hereto." Ex. A-99003 para. 18 (Nev. App. 9a).

The authorities relied upon by the Tribe do not apply. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950), is considered *infra* at 47. As discussed *infra,* at 48-49, class action cases, like Hansberry v. Lee, 311 U.S. 32 (1940), are also inappli-

that if the "water right for fishery purposes" had been claimed by the United States the court would have been required to "intervene to prevent improper Justice Department representation of conflicting interest." Tribe's Brief at 27-28.[14] Finally, the Tribe contends that the "fishery water right" could not have been asserted in *Orr Ditch* because it would not have been a justiciable issue. Tribe's Brief at 28.

Each of the Tribe's arguments is based upon the premise that the United States could not represent the Tribe in *Orr Ditch* because of an impermissible conflict between its representation of the Tribe and the Newlands Project. That premise is plainly incorrect.

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cable. Restatement (Second) of Trusts § 170 comments p, q and r (1957) set forth a statement of the duty of loyalty of a trustee to a beneficiary. They offer no statement on the question of the binding effect of litigation between a faithless trustee and innocent third parties. The Tribe's other authorities, Bogert, Trusts and Trustees § 593 (2d revised ed. 1982); Wilson v. Omaha Indian Tribe, 442 U.S. 653, 657 n.1 (1979); Colorado River Water Conservation District v. United States, 424 U.S. 800, 812 (1976); Manygoats v. Kleppe, 558 F.2d 556, 558 (10th Cir.1977); New Mexico v. Aamodt, 537 F.2d 1102, 1106 (10th Cir.1976); *cert. denied*, 429 U.S. 1121; Rincon Band of Mission Indians v. Escondido Mutual Water Co., 459 F.2d 1082 (9th Cir.1972), all deal with joinder or intervention of a beneficiary when a trustee has a conflict. The precise issue here, however, is not whether the Tribe's joinder or intervention in *Orr Ditch* would have been allowed, but whether absent joinder or intervention the Tribe is bound assuming the United States' representation of it can be characterized as negligent or as an intentional breach of its fiduciary obligation.

[14]United States v. Johnson, 319 U.S. 302 (1943), supports no such proposition. The action there was a collusive suit by private parties which sought to upset a federal statute. The case has nothing to do with a duty of intervention to prevent improper Justice Department representation.

a. The United States' Orr Ditch Representation of Both the Project Right and the Reservation Right Was Proper.

The United States government is composed of a number of departments and agencies each representing a wide variety of interests. When those departments and agencies are involved in litigation, they are jointly represented by the same government attorneys.[15] Few, if any, judgments involving the United States would be final if the Tribe's position is accepted.

Acceptance of the Tribe's argument brings the finality of any judgment rendered in this case into question. Here, in addition to seeking an 1859 implied reserved right for the Tribe, the United States also seeks a 1948 reserved right for the Stillwater Wildlife Refuge, a reserved right for the Toiyabe National Forest with priorities of 1905, 1909 and 1926 and public water hole rights with a priority

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[15]*See, e.g.*, Arizona v. California, 373 U.S. 546, 595-96 (1963), where the United States asserted claims for national forests, recreational and wildlife areas and five Indian reservations in three separate states; United States v. District Court for Water Division No. 5, 401 U.S. 527, 528-29 (1971), involving claims for four separate national forests administered by the Forest Service, claims for national recreational and other purposes by the Bureau of Reclamation, the National Park Service, the Bureau of Land Management, the Bureau of Mines and the Bureau of Sport Fisheries and Wildlife, and a claim for water for naval petroleum and oil shale reserves administered by the Department of the Navy; United States v. Akin, 504 F.2d 115, 116-17 (10th Cir.1974), *rev'd sub nom* Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), where the United States had instituted a water rights action on behalf of two Indian tribes, a national park, two national monuments and Bureau of Reclamation projects within the State of Colorado. Each of these cases involved claims to water from a common source. It is probable that the United States was representing differing or potentially differing interests, not only between Indian reservations and other federal enclaves, but also among several Indian reservations.

date of 1926. Nev. App. 154a-157a. The conflict among the rights is obvious. In its representation of the Tribe here, the United States has acted to the detriment of the other federal reservations it represents, particularly the Wildlife Refuge.[16]

If government is to function effectively, it is for the Congress to decide how and by whom the United States' proprietary and trust interests will be represented. From time to time the policies may shift, as they have here, but that shift does not mean that every judgment rendered in the interim may be set aside. The United States' representation of differing interests is inherent and necessary in our system of government. Sound judicial policy must recognize that such representation is not of itself impermissible. Until Congress determines otherwise, this Court must hold, as did the Tenth Circuit in *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir.1979), that "the United States is the proper party to protect *all* federally reserved water rights, including those set aside for use by the Indian tribes." 601 F.2d at 1131.

The Court considers the adequacy of the United States' representation of the Tribe in *Orr Ditch* some 70 years after the fact and with 20-20 hindsight. The "conflict" can, thus, be seen for what it really is, a reflection of the overriding national policy of the time of making farmers of the Indians.

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[16]If the Tribe and the United States are successful here, may the National Audubon Society or the Sierra Club bring another action claiming a conflict? This is not just an imaginary possibility. In Sierra Club v. Watt, 659 F.2d 203 (D.C.Cir.1981), the Sierra Club sought an order requiring the United States to assert implied reserved water rights for lands managed by the Bureau of Land Management in water litigation pending in Utah. Although the court found that no such right exists, the case is persuasive evidence that the assertion or nonassertion by the United States of reserved rights in particular litigation is subject to question and attack by a variety of interests with standing.

Winters and its progeny contained language that implied, if it did not expressly state, that the purpose of Indian reservations was to make farmers of the Indians. *Winters*, 207 U.S. at 576; *see also United States v. Powers*, 305 U.S. 527, 532-33 (1939); *Conrad Investment Co. v. United States*, 161 F. 829, 831 (9th Cir.1908); *Skeem v. United States*, 273 F. 93, 95 (9th Cir.1921); *United States v. Walker River Irrigation District*, 104 F.2d 334, 339 n.8 (9th Cir.1939). The express extension of the *Winters* ruling to other federal reservations for nonagricultural purposes by *Arizona v. California*, 373 U.S. 546, 601 (1963), was some 50 years away.

United States v. Walker River Irrigation District, 11 F.Supp. 158 (D.Nev.1935), *aff'd*, 104 F.2d 334 (9th Cir. 1939), is proof positive that the United States' dual representation of the Reclamation project and the Reservation had nothing to do with the fact that no quantity of water for fish was decreed in *Orr Ditch*. There the United States represented only the Walker River Indian Tribe. The conflict alleged here was not present. 11 F.Supp. at 159; 104 F.2d at 335.

Ethelbert Ward was one of the attorneys for the United States in the *Walker River* litigation as well as in *Orr Ditch*. The Walker River Indian Reservation and the Pyramid Lake Indian Reservation were the subject of the same November 1859 letter from F. Dodge to the Commissioner of Indian Affairs (Ex. U-488) where Dodge had referred to both Reservations as "embracing large fisheries." Both Reservations were the subject of a letter by the Commissioner of Indian Affairs on November 29, 1859. Exs. U-489 and U-490. Both were set aside in the same letter to the Utah Territory United States Surveyor General on December 8, 1859 (Ex. U-491) and both were confirmed by executive orders on March 23, 1874. *Walker River Irrigation District*, 104 F.2d at 338-39

In *Walker River*, the United States alleged that it had "reserved and set aside lands for the use of the Pahute and other Indians for the purpose of affording them the opportunity to acquire the arts of husbandry and civilization" and that "said lands are arid and incapable of producing crops without artificial irrigation." 11 F.Supp. at 159. No water was sought for the Walker River fishery.[17]

Walker River reinforces the notion that the primary purpose of Indian reservations was to make farmers of the Indians. It also establishes that any failure in *Orr Ditch* to obtain water for the alleged fishery purpose of the Reservation was not the result of the United States' dual representation of the Tribe and the Newlands Project. It was simply that agriculture was perceived as the primary purpose of the Pyramid Lake Reservation as of the Walker River Reservation.

The District Court's finding that the "government lawyers in *Orr Ditch*, both departmental, agency and bureaus, as well as those charged with the responsibility for the actual conduct of the litigation, are not chargeable with an impermissible conflict of purpose or interest" (Nev. App. 212a) is buttressed by consideration of the Reclamation Act of 1902. The Reclamation Act declared a national policy of reclamation of the arid lands of the West.

Before, during and after *Orr Ditch* the National Reclamation Act exemplified the overriding policy of the entire nation and its national government. It was considered a national necessity for the future prosperity of "this great country, rapidly nearing its hundred millions of population." 3 C. Kinney, *Irrigation and Water Rights* § 1237 at

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[17]Although the boundaries of the Walker River Indian Reservation were altered in 1906 to exclude Walker Lake, it still included the lower reaches of the Walker River fishery and maps introduced by the United States in the *Walker River* litigation show the reservation abutting Walker Lake. Ex. A-20 (JA 512); Ex. A-21 (JA 513).

2236-37 (2d ed. 1912). President Theodore Roosevelt's message to Congress, delivered December 3, 1901, has become a classic statement of the reasons for the Act which became law on June 17, 1902. *Id.* at § 1238 at 2238. He said, in pertinent part:

> The reclamation and settlement of the arid lands will enrich every portion of our country. . . . The increased demand for manufactured articles will stimulate industrial production, while wider home markets and the trade with Asia will consume the larger home supplies and effectually prevent competition with Eastern agriculture. Indeed, the products of irrigation will be consumed chiefly in a building of local centers and mining and other industries, which would otherwise not come into existence at all. Our people as a whole will profit, for successful home-making is but another name for the upbuilding of the nation.
>
> . . . At the very beginning Government should make clear, beyond a shadow of doubt, its intention to pursue this policy on lines of the broadest public interest.

Id. at § 1238 at 2239-40. *See also California v. United States*, 438 U.S. 645 (1978); *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 280 (1958); *United States v. Gerlach Live Stock*, 339 U.S. 725, 728-29 (1950); *Henkel v. United States*, 237 U.S. 43 (1915); and *Swigart v. Baker*, 229 U.S. 187, 193 (1913).

When the United States' representation of the Tribe in *Orr Ditch* is placed in this context, it is clear that there was nothing improper about the United States asserting claims on behalf of both the Tribe and the Newlands Project. The implied reservation of water doctrine was in its infancy and the National Reclamation Act in its heyday. The actions of the United States in *Orr Ditch* were completely consistent with the national policy of the time.

b. The United States' Representation of the Newlands Project Right and the Reservation Right Did Not Result in an Advisory Opinion in Orr Ditch.

Orr Ditch was a quiet title action that "approximated a statutory *in rem* proceeding." Nev. App. 240a. It was a judicial proceeding in which the implied reserved water right of the Pyramid Lake Indian Reservation was to be determined from the "fact, date and purpose of reservation." Under Section 8 of the Reclamation Act of 1902, "beneficial use [was] the basis, the measure and the limit" of the Reclamation Project's right. The rights of the other defendants were to be determined by the prior appropriation doctrine and "beneficial use was the basis, measure and limit" of their rights. *See* Act of March 22, 1913, Ch. 140 § 3, 1913 Nev. Laws 192 (current version Nev. Rev. Stat. § 533.035 (1981)). These are issues which are traditionally resolved by courts. *See, e.g., Winters v. United States,* 207 U.S. 564 (1908); *Arizona v. California,* 373 U.S. 546 (1963); *United States v. District Court for Eagle County,* 401 U.S. 520 (1971); *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976); *United States v. Alpine Land & Reservoir Co.,* 503 F.Supp. 877 (D.Nev.1980), *aff'd,* No. 81-4084 (9th Cir. January 24, 1983); *United States v. Walker River Irrigation District,* 104 F.2d 334 (9th Cir.1939). These issues are justiciable. *United States v. Nixon,* 418 U.S. 683, 694-96 (1974); *see also Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 156 (1951).

Not only did *Orr Ditch* present issues appropriate for judicial determination, the Constitution and Congress provided express authority to litigate them. Article III, Section 2(1) of the Constitution extends the judicial power of the United States "to controversies to which the United States shall be a party." In *Orr Ditch* the United States was plaintiff. Section 10 of the Reclamation Act authorized

the Secretary to "perform any and all acts . . . necessary and proper for the purpose of carrying the provisions of [that] Act into full force and effect." An action to quantify water rights is within the authority conferred by that section. *Cf. California v. United States*, 438 U.S. 645 (1978); Nev. App. 222a.

Congress had also determined who should represent the proprietary and trust interests of the United States in litigation like *Orr Ditch*. The power to conduct litigation in which the United States was a party had been vested in the Attorney General by Congress. Ch. 150 § 5, 16 Stat. 162 (1870) (current version 28 U.S.C. § 517). Congress also gave him the power to appoint subordinate officers to assist him in the discharge of his duties. Ch. 3935, 34 Stat. 816 (1906); ch. 150 § 17, 16 Stat. 164 (1870) (current version 28 U.S.C. § 515). Finally, Congress had granted the Attorney General and his subordinates the power to represent Indian reservations in all suits at law and in equity 25 U.S.C. § 175; *see also Heckman v. United States*, 224 U.S. 413, 437-39 (1912); *United States v. Rickert*, 188 U.S. 432 (1903); *Cramer v. United States*, 261 U.S. 219 (1923); *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir.1956), *cert. denied*, 352 U.S. 988 (1957); Nev. App. 222a-223a.

The United States' representation of both the Reclamation Project right and the Reservation right in *Orr Ditch* did not place it on both sides of the controversy in any way that would make adjudication of those rights not justiciable.[18] In water litigation all claimants are adverse to each

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[18]Assuming for the sake of argument that representation of both the Reclamation Project right and the Reservation right placed the United States on "both sides of the same controversy," the question of justiciability is answered by *United States v. Interstate Commerce Commission*, 337 U.S. 426, 431 (1949), where this Court, in response to a similar argument, said, "however anomalous this situation results from statutes defining the Attorney General's duty."

other. As stated in *Frost v. Alturas Water Co.*, 11 Idaho 294, 301, 81 P. 996, 998 (1905):

> [I]n the settlement of cases of this character every user of water on the stream and all of its tributaries in litigation are interested in the final award to each claimant. * * * [E]very claimant of the water of either stream . . . is interested in a final adjudication of all the claimants of all waters that flow to the claimants at the lower end of the stream after its junction. In other words, in my view of the question presented by the demurrer, it matters but little who are plaintiffs and who are defendants in the settlement of cases of this character; the real issue being who is first in right to the use of the waters in dispute.

See also Colorado River Water Conservation District v. United States, 424 U.S. 800, 810 (1976). Not only is each claimant adverse to all other claimants, each individual right is also adverse to all other rights.

This setting assures that there is "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *United States v. Nixon*, 418 U.S. at 697. In *Orr Ditch* the United States was able to present the Project and Reservation rights in their best light without concern that it must also present the weaknesses of each to the court. The *Orr Ditch* defendants had every reason to (and did) present facts and argument which sharpened the difficult issues concerning those rights for the court. *See, e.g.*, Ex. B-484 (JA 366-375); Ex. A-99005 (JA 399-401); Exs. B-480-B-490; Ex. B-515.

In comprehensive water litigation like *Orr Ditch*, it is the rule, rather than the exception, that many adverse claimants and rights are represented by the same attorneys. *See, e.g.*, Claim Nos. 17, 51, 72, 73, 635, 698 and 698a, all represented in *Orr Ditch* by W. M. Kearney; Claim Nos. 70, 71a, 209, 305, 375, 390, 394, 398, 411, 420, 474, 506, 521, 525,

600, 611, 631, 710, 724 and 724a, all represented in *Orr Ditch* by Summerfield & Richards, and Claim Nos. 150½, 230, 270, 408¾, 646½, 648, 683, 701, 750 and 751, all represented in *Orr Ditch* by Harwood & Springmeyer. Nev. App. 68a-141a. If, in such litigation, justiciability required that all adverse rights be separately represented, there could never be a comprehensive water rights adjudication. The hardship of denying judicial relief in such a setting, particularly to the arid West, is undeniable. *Cf. Colorado River Water Conservation District v. United States*, 424 U.S. 800, 810-811 (1976); *United States v. New Mexico*, 438 U.S. 696, 705 (1978).

Clearly then, the United States' representation of the Reservation's implied right in *Orr Ditch* presented a justiciable controversy.[19]

4. Treatment of the Facts Here and the Facts in Orr Ditch as a Unit Conforms to the Parties' Expectations.

The parties in *Orr Ditch* expected the decree to be a final adjudication of all existing claims of rights to Truckee River water. Both the District Court and the Court of Appeals recognized this. Nev. App. 185a; 255a. The Tribe has, in fact, conceded the point. 23 R. 4848. Certainly none of the parties, including the United States, expected the rights established in *Orr Ditch* to be upset by a subsequent adjudication involving a claim which at times would exceed the entire flow of the Truckee River and which would have a preemptive priority date. Nev. App. 152a; Ex. U-577 at 7-8.

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[19] In *Orr Ditch* the United States did not invoke the federal judicial power for the purpose of passing upon the validity of action by the legislative or executive branches of government. Thus the separation of powers aspect of the rule against advisory opinions is not involved here and Flast v. Cohen, 392 U.S. 83, 96 (1968), and Muskrat v. United States, 219 U.S. 346 (1911), do not apply.

Having admitted the real expectations of the parties, the Tribe then argues that these should be ignored. The reasons given by the Tribe are not only obscurely technical, they also completely disregard the policies which require a rule of claim preclusion. They are also incorrect on the facts.

a. The Justice Department Lawyers in Orr Ditch Did Not Take the Position That a "Fishery Right" Was Not Encompassed by the Case.

The Justice Department lawyers in *Orr Ditch* did not take the position that the alleged "fishery water right" was a separate cause of action. Admittedly, in April of 1925, the Special Assistant to the Attorney General, in response to an inquiry from the Attorney General (Ex. U-23, JA 391-392) as to whether the "fishing rights of the Indians" were involved in *Orr Ditch*, wrote that nothing appeared about the subject of "fish or water to be used for fish" in any pleadings. Ex. U-24 (JA 393-394).

That exchange of correspondence, however, cannot be transformed into the "position" or expectation that an alleged fishery water right was a separate cause of action. Moreover, the Special Assistant to the Attorney General was wrong, as anyone taking the time to read the Amended Bill of Complaint enclosed with his April 3, 1925 letter would have discovered. Paragraph 16 of that Amended Complaint alleges that one of the government's purposes in instituting the action was, "to protect the Indians in their . . . *fishing*." Nev. App. 6a. [Emphasis added.]

The dedicated Justice Department lawyers who participated in *Orr Ditch* would be astounded at the Tribe's suggestion that they expected *Orr Ditch* to produce something less than a decree which settled all rights on the Truckee River and its tributaries in Nevada. It was those lawyers who decided to bring the *Orr Ditch* action in federal court rather than pursuing a state administrative proceeding so that the "determination" would have "the

requisite certainty and finality and be binding on all concerned, *including the government itself.*" Ex. B-22, (JA 280). [Emphasis added.] Those lawyers "had in mind the necessity of securing as large a right for the reservation lands as possible," and "planned to plead liberally so as to accomplish that purpose and at least not to foreclose any proper claim the Government [could] make." Ex. A-11008B (JA 277). Those same lawyers did, in fact, plead and pray liberally "to the end that it [might] be known how much of said waters [might] be diverted from said river by the parties [thereto] and for what purposes, where, by what means of diversion, and with what priorities." Nev. App. 10a; 2a-11a.

It was also those Justice Department lawyers who argued persuasively to the *Orr Ditch* district judge for an order that pleadings filed by the defendants "be deemed to be directed against each and every other defendant . . . when adverse to or affecting the claims made by them, as well as against the plaintiff" (Ex. B-468, JA 311) so that the suit would not fail because "it [did] not result in a final settlement of the rights and priorities of all water users." Ex. A-99008 (JA 287). Persuaded by the arguments of those lawyers, the trial judge entered such an order so that the *Orr Ditch* "litigation [would] finally settle all controversies over the waters of the Truckee River." Ex. A-99037 (JA 309). Finally, it was also those Justice Department lawyers who agreed to a final decree which "forever enjoined and restrained [the parties] from asserting or claiming any rights in or to the waters of the Truckee River or its tributaries . . . except the rights specified, determined and allowed by [that] decree." Nev. App. 145a.

Based upon those facts and more, the District Court and the Court of Appeals concluded that "*Orr Ditch* was intended by all concerned lawyers, litigants and judges as a general all-inclusive water adjudication suit which sought to adjudicate all rights and claims to the waters

of the Truckee." Nev. App. 225a. It cannot be said that there was no evidence for that conclusion.

b. Neither the "Same Evidence" Test nor the Leading Water Law Treatises of the Day Suggests Anything Other Than an All-Inclusive Adjudication.

Neither the "same evidence" test, discussed *infra* at 34-35, nor S. Weil, in his treatise *Water Rights in the Western States* (3rd ed. 1911), nor C. Kinney, in his treatise *Irrigation and Water Rights* (2d ed. 1912), supports the Tribe's contention that the alleged fishery claim is not a part of the *Orr Ditch* cause of action. Like other writers of their era, Wiel and Kinney used the term "res judicata" as a synonym for both claim and issue preclusion. In attempting to defeat the legitimate expectations of the *Orr Ditch* parties, the Tribe quotes from 2 *Irrigation and Water Rights* § 1563 at 2829-31 and 2 *Water Rights in the Western States* § 1233 at 1137. The cases cited by Wiel and Kinney in support of those statements in their texts involve issue preclusion rather than claim preclusion.

For example, Kinney relied upon *Union Mill & Mining Co. v. Dangberg*, 81 F. 73, 116 (D.Nev.1897), which in turn, relied upon *McDonald v. Bear River and Auburn Water and Mining Co.*, 15 Cal. 145 (1860). *McDonald* was a suit in equity to enjoin the defendants from diverting a certain quantity of water from the Bear River. Bear River contended that its right to 1,000 inches of water as against McDonald had been adjudicated in a former action. In that former action, Bear River had alleged that 1,000 inches of water had been appropriated by it for mill purposes and that McDonald had diverted that water to Bear River's damage. In the earlier action Bear River had obtained a judgment for money damages. 15 Cal. at 147-48.

Bear River argued that the verdict and judgment in the first case conclusively determined the quantity of water

to which it was entitled and that the defendants were estopped from putting the same matter again in issue in another suit. *Id.* Holding that the precise quantity of water was not an essential determination in the award of money damages in the prior suit, the California Supreme Court wrote that "in order to constitute an estoppel . . . the same point must be put in issue, upon the record, and directly found by the jury." *Id.* at 148. *McDonald* clearly states a rule of issue preclusion.[20]

In parts of their works not cited by the Tribe, both Kinney and Wiel state rules of claim preclusion. For example, Wiel states:

> Where a claimant of a priority to the use of water for irrigation appears in a statutory proceeding for the adjudication of such priorities, and files a statement of his claim, the decree thereunder is res judicata as to him and his rights, though he neglects to offer proofs . . . . And this applies, even though they had a water right which they omitted to claim.

2 S. Wiel, *Water Rights in the Western States* § 1232 at 1132 (3rd ed. 1911). Kinney likewise states that:

> The doctrine of appropriation may be deemed a doctrine of fixed rights, and decrees and judgments rendered in actions to adjudicate water rights may award a definite and certain quantity of water to the

[20]Union Mill & Mining Co. v. Dangberg, 81 F. 73 (D.Nev.1897), also relies upon Russell v. Place, 94 U.S. 606 (1877), a case which also states a rule of issue preclusion. Kinney also relied upon Kidd v. Laird, 15 Cal. 161 (1860), which held "that a verdict found on any fact or title distinctly put in issue, is conclusive in another action between the same parties or their privies, in respect of the same fact or title." 15 Cal. at 182.

The quoted section of Wiel cites Buckers Irrigation, Milling & Improvement Co. v. Farmers Independent Ditch Co., 72 P. 49 (Colo.1902), where copies of two decrees were offered and received in evidence to prove whether a certain brook was the natural outlet of a certain lake. That case too deals with issue preclusion.

> respective parties, and such decrees are deemed res judicata as finally settling the rights between such parties.

2 C. Kinney, *Irrigation and Water Rights* § 1564 at 2832 (2d ed. 1912). The treatment of res judicata by the leading water law authorities of the time supports the expectations of "all concerned" that *Orr Ditch* would and did "finally settle all controversies over the waters of the Truckee River." Ex. A-99037 (JA 309).

c. The Representation of the Tribe and the Reclamation Project by the United States Had No Impact on the Legitimate Expectations of the Parties.

The *Orr Ditch* litigants intended and expected a final adjudication. Those legitimate expectations were unrelated to whom the United States represented in *Orr Ditch*.

In arguing the contrary, the Tribe inexplicably relies on Restatement (Second) of Judgments § 36. That section by its plain language is not relevant here.[21]

Section 36 deals with an appearance by *one* party in *two different actions* in different capacities. Until 1976, the Tribe did not appear in *Orr Ditch* at all. The United States appeared in *Orr Ditch* on behalf of the Newlands Project and the Tribe. The Tribe cannot change that fact by focusing on the quantity of water awarded the United States rather than on whom it represented.

A complete answer to the Tribe's contentions on this question is set forth in *United States v. California &*

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[21] Section 36 provides:

> (1) A party appears in his individual capacity unless, in his designation as a party or by other manifestation, it is made evident that he appears in some other capacity.
>
> (2) A party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity.

Oregon Land Co., 192 U.S. 355 (1904). There the United States had brought suit seeking to have certain patents to land issued by it declared void. The ground for the claim was that the lands were within the Klamath Indian Reservation and were lands "heretofore reserved to the United States." 192 U.S. at 356. The Land Company defended on res judicata grounds. Earlier the United States had sought to have the patents declared void on other grounds and a final decree had been entered in favor of the Land Company. *Id.* at 356. Holding the former decree was a bar, Justice Holmes wrote:

> The parties, the subject-matter, and the relief sought all were the same. It is said, to be sure, that the United States now is suing in a different character from that in which it brought the former suit. There it sued for itself,—here it sues on behalf of the Indians. But that is not true in any sense having legal significance. It would be true of a suit by an executor as compared with a suit by the same person on his own behalf. But that is because in theory of law the executor continues the *persona* of the testator, and therefore is a different person from the natural man who fills the office. [Citation.] Here the plaintiff is the same person that brought the former bill, whatever the difference of the interest intended to be asserted. [Citation.]

Id. at 358; *see also Werlein v. City of New Orleans*, 177 U.S. 390, 400-02 (1900).

Even if the focus is shifted from *whom* the United States represented in *Orr Ditch* to *the rights* it represented, the result is the same. The evidence is overwhelming that the United States intended to and did place "in issue the full Reservation cause of action." Nev. App. 226a; *see also supra* at 24-26. The implied reserved right of the Reservation was adjudicated in *Orr Ditch* and it is that same right which the Tribe would present here. The *Orr Ditch* parties were fully justified in their expectation that

the Tribe was bound. *See Chicago, R.I. & Pac. Ry. Co. v. Schendel*, 270 U.S. 611, 620 (1926).[22]

d. The Quiet Title Nature of the Action Did Not Lessen the Expectations of a Final and Complete Adjudication.

Orr Ditch was a quiet title action. Both the District Court and the Court of Appeals, however, found that the United States placed the full Reservation right in issue in *Orr Ditch*. Nev. App. 226a.

The *Orr Ditch* litigation was undeniably comprehensive in intent and effect. The complaint was framed in the broadest possible way to assert the court's jurisdiction over all water users on the river. Both individual notice and widespread publicity of the action were provided. There was adversity between the plaintiff and all defendants. Nev. App. 240a. The court had ordered that "such affirmative pleadings as have been or may be filed by . . . defendants, and each or any of them . . . [however designated], shall be deemed directed against . . . the plaintiff." Ex. B-468 (JA 311). The resulting decree was stated in the broadest terms and was intended to prevent relitigation of the claims determined and any new claims. Nev. App. 240a; Nev. App. 145a; *see supra* 24-26.

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[22]The Tribe, in effect, argues that because of the decline of the fishery, the *Orr Ditch* defendants should have anticipated this case. Knowledge of the decline of the Reservation fishery cuts both ways. Because nothing was done about that decline while *Orr Ditch* was pending and particularly during the effective years of a temporary restraining order entered in part for the purpose of testing the preliminary determination of the several water rights and the resulting operation of the Truckee River, it was reasonable for the parties to conclude that nothing would be done. That is certainly more reasonable than assuming the matter would be corrected 70 years after *Orr Ditch* began and 39 years after it ended.

The Tribe's reliance on *Lynch v. Kemp*, 49 P.2d 817 (Cal.1935) is misplaced. In *Lynch*, title to two separate and distinct parcels of real estate located in different cities had been litigated in two separate actions involving the same parties. Lynch, the plaintiff in the second case, contended that Kemp, the plaintiff in the first case, had improperly split a single cause of action because in the prior action she had sought to quiet her title to only one of the parcels. 49 P.2d at 818. The Tribe analogizes water to be used for irrigation and water to be used for a fishery to the two parcels of land in *Lynch*. That analogy is inappropriate because the water of the Truckee River represents but "one parcel" in which numerous parties claim an interest. This view is described in *Frost v. Alturas*, 81 P. 996 (Idaho 1905), where the court, dealing with a joinder issue, said that "the relation of prior and subsequent appropriators of the waters of a stream is that of tenants in common." 81 P. at 997.

Here, the Tribe is in the position Kemp would have been in if she had attempted to bring two separate actions on different theories to quiet title to just one of the parcels. In these circumstances, "the United States was at liberty to state all its grounds for claiming [an implied reserved right for the Reservation and] it was bound to do so." *United States v. California & Oregon Land Co.*, 192 U.S. 355, 359-360 (1904). The *Orr Ditch* parties were justified in their expectation that the United States was not keeping "a concealed weapon in reserve." *See id.*

Giving due consideration to the expectations of the parties is essential if courts are to apply claim preclusion in a manner which accomplishes its purposes. Society and litigants look to the courts and their decisions for the final resolution of disputes. Where their reasonable expectations indicate that the claim in the second action is identical to the claim in the first the courts ought to apply claim preclusion. No action more strongly demands application of

claim preclusion based upon the parties' expectations than does this one.

5. The Tribe's Claim Is Also Barred by the Law of Claim Preclusion as of the Date of the Orr Ditch Adjudication.

Under the criteria set forth in the Restatement Second, the Tribe's claim here is clearly barred. It is no less barred under the law which was in effect during the pendency of *Orr Ditch*.[23] It was well established long before *Orr Ditch* that a final judgment on the merits of an action precludes the parties or their privies from relitigating matters that were, or could have been, raised in that action. *See, e.g., Cromwell v. County of Sacramento*, 94 U.S. 351, 352-53 (1877). This Court had applied that rule in a variety of contexts before and during *Orr Ditch* in a manner which makes the claim here part of the claim in *Orr Ditch*.

Again *United States v. California & Oregon Land Co.*, 192 U.S. 355 (1904) (*see supra* at 28-29 and accompanying text), is controlling. There Justice Holmes wrote:

> The best that can be said . . . to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means, —that is to say, by evidence that the lands originally were excepted from the grant. But in this as in the former suit, it seeks to establish its own title to the fee.
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> * * *
>
> The whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole

[23]The Tribe's argument assumes that the approach taken by the Restatement (Second) of Judgments § 24 (1982) for determining the identity of claims is a change in the law. As is discussed *supra* at 8, in reality the Restatement approach is nothing more than a restatement of the elements always considered by the courts in applying principles of preclusion.

> case at one time. He cannot even split up his claim [citations] and, a fortiori, he cannot divide the grounds of recovery. The United States was bound then to bring forward all grounds it had for declaring the patents void, and when the bill was dismissed, was barred as to all by the decree.

Id. at 358. *Accord Werlein v. City of New Orleans*, 177 U.S. 390, 399 (1900); *see also Montezuma Canal Co. v. Smithville Canal Co.*, 218 U.S. 371, 381-84 (1910).

The prayer in *Orr Ditch* was that by setting aside the Reservation, the United States reserved from further appropriation "from and of the waters of the said Truckee River five hundred (500) cubic feet of water per second of time." Nev. App. 7a-8a. The United States was bound to put forward in *Orr Ditch* all grounds it had for the water it claimed for the Reservation. The best that can be said to distinguish the claim here from that in *Orr Ditch* is that the Tribe now puts forward a new ground for that prayer. The decision in *United States v. California & Oregon Land Co.* bars the assertion of any new grounds for recovery.

The Tribe would distinguish *United States v. California & Oregon Land Co.* on the basis that it involved but a single parcel of property whereas the present case assertedly involves two rights, one for the fishery and one for irrigation. Tribe's Brief at 23.[24] The distinction is transparently specious. The water of the Truckee River represents but one parcel in which numerous parties claim an interest. *See, e.g., Frost v. Alturas*, 81 P. at 997 *supra* at 31. The Justice Department lawyers saw *Orr Ditch* in precisely that fashion. In an August 1918 letter to the Judge, the lawyers noted that "in a water suit of this kind, a single res *e.g.* water supply, is to be divided and apportioned between

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[24]It should be noted that under the general provisions of the *Orr Ditch* decree, the Tribe, like all other parties, is permitted and allowed to use water for livestock and domestic purposes in addition to using it for irrigation. Nev. App. 143a.

a number of persons, each of whom claim rights adverse to, but contingent and interdependent upon, the rights of others . . . ." Ex. A-99008 (JA 288).

The Tribe favors the "same evidence test" for determining identity of causes of action. *United States v. The Haytian Republic*, 154 U.S. 118, 125 (1894).[25] That test provides it no true comfort. The only different evidence involved here goes to the quantity of the implied reserved right. As the Court of Appeals wrote, "though a determination of quantity would depend on different evidence, this by itself is insufficient to distinguish this cause of action from the *Orr Ditch* cause of action." Nev. App. 225a.

The focus of the same evidence test was on the evidence necessary to prove the right to relief as distinguished from the evidence necessary to prove the relief itself. *See* Restatement of Judgments § 61 (1942). As noted in comment a to Section 61, if a plaintiff suffers harm to his person and property in an automobile collision and brings an action for the harm to his person, a judgment in that action precludes

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[25]The same evidence test was only one test applied during *Orr Ditch* for the purpose of determining whether or not causes of action were identical. United States v. The Haytian Republic, 154 U.S. 118, 125 (1894). In Schuykill Fuel Corp. v. B & C Nieberg Realty Corp., 250 N.Y. 304, 165 N.E. 456 (1929), Justice Cardozo, then a Judge of the New York Court of Appeals, set forth an "impairment of rights test" for determining that question. Under Cardozo's test the identity of causes of action turned on whether the substance of the rights or interests established in the first action would be destroyed or impaired by the prosecution of the second. Even under that test, the claim here is part of the claim adjudicated in *Orr Ditch*. The District Court found that the Tribe had not proved by evidence of sufficient quality and credibility that no harm would be sustained to vested legal rights if the Reservation was entitled to water with an 1859 priority for certain minimum flow into the Truckee River for spawning and for flow into Pyramid Lake. Nev. App. 191a.

him from maintaining a second action for the harm to his property. Restatement of Judgments § 61, comment a at 241. Similarly, under the original Restatement and the law during *Orr Ditch*, a plaintiff was precluded from maintaining a second action "although he present[ed] a ground for the relief asked other than those presented in the original action." Restatement of Judgments § 63 at 257-58. A plaintiff was also precluded from bringing a second action to enforce an alternate remedy. Restatement of Judgments § 64 at 265; § 65 at 271; *see also* Restatement (Second) of Judgments § 25(2), comment f at 214 (1982).

These principles bar the Tribe's claim here. The Tribe has failed to distinguish between the facts necessary to sustain the cause of action for an implied reserved water right and the facts necessary to prove the relief, or in other words, the quantity of water. As the Court of Appeals noted, although the evidence necessary to quantify the water needed to sustain the fishery may be different from the evidence necessary to quantify water needed for irrigation, the bases for either claim are the same. Nev. App. 225a. Whether the water is to fulfill the alleged fishery purpose or the agricultural purpose, the right arises from "the executive actions by which the Reservation was established, and the intent that motivated those actions." *Id.* Similarly, "the priority date depended on the same evidence." The quantity of water would be "appurtenant to the same reservation, and relate to the same source of water." *Id.* at 224a-225a. Clearly then, as the Court of Appeals determined, "the evidence needed to sustain [this action] would have sustained [*Orr Ditch*]" and, under the decisions of this Court rendered before and during *Orr Ditch*, under the leading water law treatises of time (*see supra* at 26-34) and under the same evidence test, the Tribe's claim here is part of the *Orr Ditch* cause of action and is thereby barred.

6. The Tribe Was a Party to Orr Ditch Through Its Authorized Representative and Its Claim Here Is No Different from the Claim Asserted by That Representative.

The Tribe was effectively a party to *Orr Ditch*. It was represented by its trustee, the United States. Relying on *Montana v. United States*, 440 U.S. 147 (1979), and on a number of cases that hold that an Indian tribe may sue in its own right to protect its interest in property, the Tribe contends that the cause of action of the United States when it sues to protect and enforce Indian property rights is somehow different from that of the Indian owners suing to do the same thing.[26] The Tribe never explains or describes that difference. It is difficult to imagine what it could be since, in both instances, the same claim is being made and based on the same facts.

Montana v. United States, 440 U.S. 147 (1979), is simply inapposite. *Montana* dealt with the extent of preclusion against a non-party who nonetheless controlled or participated in a substantial way in earlier litigation. This Court held that, although the non-party's cause of action might be different and claim preclusion thus inapplicable, it was nonetheless bound by the determination of the particular issues litigated. 440 U.S. at 217.

Montana simply did not deal with the representation context at all and, significantly, this Court relied upon sections of the Restatement Second dealing with non-party control of or participation in litigation rather than representation. *Id.* at 218. *See and compare* Restatement (Sec-

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[26]The Tribe argues that in an ordinary trustee-beneficiary relationship only the trustee may sue third parties. The Tribe's reference to G. Bogert, *Trusts and Trustees* § 869 (2d rev. ed. 1982), is significantly incomplete. In the same section, Bogert makes clear that, although ordinarily actions are brought and prosecuted by the trustee, there is no bar to the action by the beneficiary. *See* G. Bogert, Trusts and Trustees § 869 at 90-96 (2d rev. ed. 1982).

ond) of Judgments § 39, comment b, pp. 383-84 (1982) *with* Restatement (Second) of Judgments § 41 (1982).

Under the rule proposed by the Tribe, persons represented in litigation by the United States would never be barred by claim preclusion. Such persons could relitigate a claim as long as they could find unlitigated facts and legal theories to support it. That rule would be directly contrary to the sound policy reasons for issue and claim preclusion relied upon by this Court in *Montana*.

In *Orr Ditch* the United States was plaintiff and acted in its fiduciary capacity and asserted the same claim which the Tribe seeks to assert here. The rule which does apply is set forth in Restatement (Second) of Judgments § 41 (1982). Application of that rule to this case is considered *infra* at 43-46.

B. This Case Presents No Circumstances Which Justify an Exception to Claim Preclusion.

The Tribe argues that the United States' representation of the Newlands Project and Reservation rights in *Orr Ditch* brings this case "within the specific exceptions to the rule against splitting a cause of action" set forth in Sections 26(1)(d) and 26(1)(f) of the Restatement (Second) of Judgments. Tribe's Brief at 30. It has been established that the United States acted properly in *Orr Ditch*. See *supra* at 15-19. The dual representation argument is no more compelling on the exception question than it is on the identity of the cause of action issue.

Claim preclusion promotes stability of judicial decisions, secures the orderly resolution and termination of disputes, minimizes inconsistent results, and prevents unjust double recoveries. It also produces the most efficient allocation of judicial resources, reduces the inevitable inconvenience of court proceedings to the parties and equalizes,

to some extent, parties with unequal resources.[27] Enforcing the rule of claim preclusion here will serve many of those public policy objectives, the most important of which is clearly that of reliance on the stability and finality of court decisions. It has been 70 years since *Orr Ditch* began and 39 years since it ended. In the years of reliance on the rights established in that action, populations and economies have been created and maintained and patterns of life established. A case in which the stability of judicial decisions is more important is difficult to imagine, except, perhaps, in other and not dissimilar instances involving attempts to relitigate already adjudicated reserved water rights with early priority dates.

No exception can be justified under the two sections of the Restatement cited by the Tribe or the case law generally. There is simply no public interest to be served which can outweigh, under the circumstances here, the policy of finality.

Section 26(1)(d) of the Restatement (Second) of Judgments would allow an exception when "the judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim." Thus, in *Mercoid Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661 (1943), this Court refused the preclusive bar, which had been technically created by a prior judgment, but which would have placed the Court's "imprimatur on a scheme which involve[d] a misuse of the patent privilege and a violation of the antitrust laws." *Id.* at 670. *See also Denver Building and Construction Trades Council v. National Labor Relations Board*, 186 F.2d 326 (D.C. Cir. 1950), *rev'd on other*

[27] A wealthy party could, if allowed to repeat litigation, overwhelm a less wealthy adversary in a second action. This concern militates against granting exceptions too liberally in favor of the United States with its inexhaustible resources.

grounds, 341 U.S. 675 (1951) ("To apply [preclusion] would submerge the plan of Congress for the administration and enforcement of its policy." 186 F.2d at 332); *White v. Adler*, 289 N.Y. 34, 43 N.E.2d 798 (1942), *rearg. den.*, 289 N.Y. 647, 44 N.E.2d 621 (1942); Restatement (Second) of Judgments § 26, comment e, illustration 4 and 5 (1982). There is, however, no such statutory or constitutional scheme to be implemented here and the Tribe has advanced none.

Section 26(1)(f) is likewise of no help to the Tribe here. That section would allow an exception when "it is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason." Restatement (Second) of Judgments § 26(1)(f) (1982). Neither the Tribe nor the Restatement refers to a single case where an exception has been allowed to defeat the primary preclusion policy served by the rule, *i.e.*, the finality and stability of court decisions. Such cases don't exist because of the overwhelming importance of judicial certainty to the public generally and to the parties directly involved.

Courts have allowed an exception when the effect of preclusion is to shield or perpetuate wrongdoing.[28] There is no wrongdoing by the defendants which would be sheltered by the enforcement of preclusion. The Tribe seeks to avoid the bar of the final judgment in *Orr Ditch* based upon an alleged breach of fiduciary duty by the United States in representing it in that litigation. The remedy sought by the Tribe is the relitigation of the size of its 1859 implied reserved water right. That remedy runs not against the United States, the alleged wrongdoer, but against the *Orr Ditch* defendants and subsequent appropriators, innocent persons who have relied and who continue to rely on the *Orr Ditch* judgment and

[28]*See, e.g.*, La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc., 495 F.2d 1265 (2d Cir.1974).

who neither participated in nor were even aware of any breach of duty. This case therefore presents the precise opposite of the "wrongdoing" exception case. Allowing an exception here would protect the alleged wrongdoer.

Another factor to be considered in weighing the exception to the rule is the availability of relief outside the judicial system. If the United States breached its fiduciary duty to the Tribe, the Tribe's recourse ought to be against the United States. A remedy against the United States is and has been available to the Tribe and has, in fact, been used. Congress has provided remedies and established a procedure for obtaining and recovering the value of any rights lost by such breach. *See* Indian Claims Commission Act, 25 U.S.C. §§ 70-70v-3 (1976 and Supp. IV 1980). In fact, on July 23, 1975, the Tribe was awarded $8,000,000 by the Indian Claims Commission "for the loss of the Tribe's alleged . . . *Winters* reserved water rights for the Pyramid Lake fishery and other alleged water rights." Nev. App. 190a.

In addition, the United States has the power to allocate and spend federal funds to restore the fishery artificially and it has done just that. Between 1973 and 1976, some $32,000,000 in federal funds alone, not including expenditures by the State of Nevada, were spent to restore the Pyramid Lake fishery. *Id.* Furthermore, since the trial and during the appeal in this action, Congress has appropriated and spent an additional $2.3 million to construct a second fish hatchery at Pyramid Lake. It has also appropriated $2.1 million for operation of the Reservation fish hatcheries for fiscal years 1981 and 1982.

Relief is available and has been provided to the Tribe from the United States. Additional relief at the expense of innocent parties would be neither fair nor legally justifiable.

II

THE RES JUDICATA DEFENSE IS AVAILABLE TO SUBSEQUENT APPROPRIATORS WHO WERE NOT PARTIES TO ORR DITCH BUT WHO HAVE RELIED ON THE ORR DITCH DECREE.

Subsequent appropriators on the Truckee River system who are neither *Orr Ditch* parties nor successors in interest to *Orr Ditch* parties are legally entitled to the protection of the *Orr Ditch* decree. Their rights have been acquired pursuant to Nevada law and subject to the rights adjudicated in *Orr Ditch*. 1 S. Wiel, *Water Rights in the Western States* § 302 at 313-314 (3rd ed. 1911); *Proctor v. Jennings*, 6 Nev. 83, 88 (1870). Those subsequent appropriators took the stream as they found it and acquired their rights in reliance on the substance of the *Orr Ditch* decree and its finality.

Issue preclusion, which includes both direct and collateral estoppel, prevents the Tribe from seeking to increase the quantity of its implied reserved right against subsequent appropriators based upon the Reservation's alleged fishery purpose. Restatement (Second) of Judgments § 27 (1982) notes that "when an issue of fact or law is actually litigated and determined by a valid and final judgment . . . the determination is conclusive in a subsequent action . . . whether on a same or different claim."[29] Any implied reserved right claim requires a determination of the primary purpose or purposes of reservation, whether or not water is needed to fulfill the primary purpose or purposes and, if so, how much. *United States v. New Mexico*, 438 U.S. 696

[29]Nevada in No. 81-2245 and TCID in 81-2276 have set forth the relevant criteria for delineating the issue on which litigation is or is not foreclosed. *See* Brief of Petitioner, No. 81-2245 at 41 n.51; Brief of Petitioner, No. 81-2276 at 35. Those criteria and Nevada's and TCID's arguments will not be repeated here. The policy reasons which make the claim here and the claim in *Orr Ditch* the same (*see supra* at 12-13) also delineate the issues on which litigation is foreclosed.

(1978). All of those issues thus were necessarily litigated and determined in *Orr Ditch*. For the Tribe to prevail on its claim here, even as against subsequent appropriators, those same issues must be litigated again and with a different result.

Prevailing rules of issue preclusion, whether the estoppel is direct or collateral, prevent the Tribe from relitigating the primary purposes of its Reservation and the quantity of water needed to fulfill those purposes in this case. Restatement (Second) of Judgments § 27 (1982). Those rules also permit nonparties, like the subsequent appropriators here, to take advantage of that preclusion. *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313, 323-25 (1971); *Bernhard v. Bank of America*, 122 P.2d 892, 894-95 (Cal.1942).

Apart from doctrine, to permit the Tribe to relitigate its implied reserved right as against subsequent nonparty appropriators only is simply untenable.[30] The Court of Appeals properly recognized that the failure to extend the relitigation bar to subsequent nonparty appropriators would be both unjust and unworkable from the practical standpoint of administration of the Truckee River system. Nev. App. 240a. Subsequent nonparty appropriators must be permitted to rely on the *Orr Ditch* decree; otherwise it would be "impossible ever finally to quantify a reserved water right." *Id.*

III

APPLICATION OF CLAIM PRECLUSION HERE DOES NOT DENY THE TRIBE PROCEDURAL DUE PROCESS.

Procedural due process, that is, notice and an opportunity to be heard, was afforded the Tribe in *Orr Ditch*. The

[30]It is doubtful that the Tribe's position would be improved even if it could assert its alleged fishery right against subsequent appropriators because those rights are "relatively few and minor." Brief for Respondent Pyramid Lake Paiute Tribe of Indians In Opposition to Petitions for Writ of Certiorari, Nos. 81-2245, 81-2276 at 20.

Tribe was represented in *Orr Ditch* by the United States, an entity with full power and authority to represent it. 25 U.S.C. § 175; *Heckman v. United States,* 224 U.S. 413, 444-46 (1912); *United States v. Minnesota,* 270 U.S. 181, 194 (1926); *United States v. California & Oregon Land Co.,* 192 U.S. 355, 358 (1904). The United States had adequate notice and opportunity to litigate all the issues and claims encompassed by *Orr Ditch.* The fact that the Tribe was not served with process or perhaps was not even subject to service of process is of no consequence. *Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 356, 363-67 (1921); Restatement (Second) of Judgments § 41(2) (1982).[31] The requirements of procedural due process were thus fully met.[32]

Under the general rules governing participation in litigation through an authorized representative, representation by the United States binds Indian tribes and individual Indians. *Heckman v. United States,* 224 U.S. 413, 445-46 (1912); *United States v. Emmons,* 351 F.2d 603, 604 (9th Cir.1965); *Oklahoma v. United States,* 155 F.2d 496, 498 (10th Cir.1946); *Creek Indians National Council v. Sinclair Prairie Oil Co.,* 142 F.2d 842, 845 (10th Cir.) *cert. denied* 323 U.S. 78 (1944); *Pueblo of Picuris v. Abeyta,* 50 F.2d 12, 13 (10th Cir.1931); *Vinson v. Graham,* 44 F.2d 772, 779 (10th Cir.1930) *cert. denied* 283 U.S. 819 (1931); *Winship v. Ricketts,* 32 F.2d 476, 479 (8th Cir.1929); *see also* Re-

[31]Restatement (Second) of Judgments § 41(2) provides:

(2) A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process.

[32]Wolff v. McDonnell, 418 U.S. 539 (1974), and Schroeder v. City of New York, 371 U.S. 208 (1962), do not apply. In each the party claiming inadequate notice had not been represented in the proceeding by anyone at all.

statement (Second) of Judgments § 41(1)(d).[33] The rules are the same for Indians as for non-Indians. To the extent that due process will not permit a non-Indian to be barred by the decision in an action in which he was represented by another, it likewise will not permit a similarly situated Indian to be held bound. Nev. App. 326a; *cf. United States v. Mason*, 412 U.S. 391, 397 n.6 (1973).

Under the Restatement (Second) of Judgments § 42(1)(e) (1982), a represented person is not held precluded if "the representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent." As noted by the Restatement Reporter, the provisions of Section 42 "are thus closely related to, if indeed they are not particularized expressions of, the requirements of due process, a fact which historically was obscured by the tendency of courts to see some of the questions in the context of necessary parties' issues." Restatement (Second) of Judgments § 42, reporter's note at 412 (1982).

In ruling on this issue below, the Court of Appeals assumed, but expressly did not decide, that the government's representation of the Tribe in *Orr Ditch* was improper and inadequate.[34] Nev. App. 237a-238a. The Court's

[33]Restatement (Second) of Judgments § 41(1)(d) provides:

> (1) A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party. A person is represented by a party who is:
>
> • • •
>
> (d) An official or agency invested by law with authority to represent the person's interests;

[34]The Tribe's Cross-Petition asserts that the Court of Appeals found that the "government's representation of the Tribe in *Orr Ditch* was improper and inadequate." Tribe's Cross-Petition at 8. That simply is not true. Based on the assumption that it had made at the outset (Nev. App. 237a-238a), the Court of Appeals subsequently noted that the government's representation was "analogous to that of a faithless fiduciary." Nev. App. 239a. Referring to the Restatement (Second) of Trusts § 170, comments p, q and r

focus then correctly shifted to the second requirement of the Restatement rule, that is, to the knowledge, if any, of the *Orr Ditch* defendants of any such inadequate representation. *See also Kersh Lake Drainage District v. Johnson*, 309 U.S. 485, 491 (1940); *Kerrison v. Stewart*, 93 U.S. 155, 160 (1876).

On that second question, the Court of Appeals noted that the trial judge found that any impropriety in the government's representation in *Orr Ditch* was unknown to the defendants in *Orr Ditch*. Nev. App. 238a. It stated that it could not determine that that finding was clearly erroneous and that the plaintiffs did not challenge the finding.[35] *Id.*

(1957), the Court of Appeals also noted that by representing the Tribe and TCID in *Orr Ditch*, the "government compromised its duty of undivided loyalty to the Tribe." Nev. App. 242a. The Court never, at any point, made any determination that that compromise resulted in inadequate representation of the Tribe in *Orr Ditch*. The trial judge specifically found no such improprieties. Nev. App. 191a-192a.

The Tribe also argues that "the district court specifically found that the fishery water right was knowingly sacrificed by the government." Tribe's Brief at 40. That also is not true. As the Court of Appeals pointed out "the district court did not find that executive officials intentionally extinguished the fishery claim but only that their decisions *resulted* in extinguishment." Nev. App. 213a n.2 [Emphasis added].

[35]Having failed to challenge that finding on appeal, the Tribe cannot challenge it here. Pennsylvania R. Co. v. Illinois Brick Co., 297 U.S. 447, 463 (1936); *cf.* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 214 (1951). The Tribe attempted to challenge the finding for the first time on its petition for rehearing in the context of the burden of proof at trial. It argued that the burden of proof on that issue was on the defendants. The "essential elements" of claim preclusion, (1) a valid and final judgment on the merits, (2) subsequent litigation on the same cause of action, and (3) involving the same parties or those in privity with them, were established by the defendants. Once those essential elements were prima facie established, the Tribe had the burden of proving an exception to the general rule. Furthermore, the Tribe cannot challenge the finding for the first time in a petition for rehearing. Independent Wireless Telegraph Company v. Radio Corporation of

Once inadequate representation is assumed, the relevant inquiry under the Restatement is whether the defendants knew. In *Kersh* and *Kerrison*, however, this Court has taken an even more restrictive approach. In those cases, in holding a beneficiary bound by a judgment in an action in which he was represented by his trustee, this Court noted that an exception to the preclusion rule would be made only where there had been fraud or collusion between the trustee and the adverse party.

None of the cases cited by the Tribe alter the rule established by this Court in *Kersh* and *Kerrison* or support the application of a different rule in the present case. In this preclusion context, the due process question does not arise because the Tribe was represented by "government officials" in *Orr Ditch*. It arises because of judicial action by third parties seeking to enforce the *Orr Ditch* judgment. *Hansberry v. Lee*, 311 U.S. 32, 41 (1940); *Kersh Lake Drainage District v. Johnson*, 309 U.S. 485, 490 (1940); *Postal Telegraph-Cable Co. v. City of Newport*, 247 U.S. 464, 476 (1918). The fact that the Tribe is entitled to due process protection in its dealings with the United States government may give the Tribe procedural and substantive rights which an ordinary beneficiary would not have against a private trustee. But the existence or nonexistence of those additional procedural and substantive rights does not alter the rule for determining whether the Tribe is bound by the *Orr Ditch* decree insofar as third persons are concerned.[26]

America, 270 U.S. 84 (1926). Finally and in any event, the finding is not clearly erroneous.

[26]It is this distinction which makes cases like Lugar v. Edmundson Oil Co., 102 S.Ct. 2744 (1982) inapposite. While such cases may support the Tribe in securing relief from the United States, they do not alter the rules for determining whether innocent third parties are protected by claim preclusion. It should be noted that "due process" not only limits a court's power to give effect to a judgment, it also limits the power to refuse to give effect to such a judgment or to restrict that effect. 1B J. Moore, Moore's Federal Practice § 0.406[2] at 906-07 (2d ed. 1982).

It is important to recognize the difference between the due process question presented here, where third parties assert the preclusive effects of a judgment, and the question that would be presented if the United States were asserting those preclusive effects in an action by the Tribe against the United States. That difference is demonstrated by *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950).

Mullane involved the kind of notice a beneficiary is to have of a proceeding which would bar the beneficiary's rights "to have the trustee answer for negligent or illegal impairments of [his] interests." 339 U.S. at 313. In *Mullane*, this Court held that, as a matter of due process, the beneficiary would not be barred unless constitutionally adequate notice and hearing procedures were established before the settlement process went into effect. *Id.* at 315. Thus, under *Mullane*, the Tribe is not barred from an action against the United States nor may the United States hide behind the *Orr Ditch* decree or any administrative determinations leading up to it in any action against it by the Tribe.

However, *Mullane* does not hold or remotely suggest that the rights and interests of a trust beneficiary, once determined in legal proceedings between the trustee and third parties, are subject to relitigation because the beneficiary was not given notice of, or did not participate directly in the proceedings. In fact, by its concern for the beneficiary's rights against the trustee, the *Mullane* Court clearly and necessarily implied the contrary, that is, that relitigation of claims as against third parties would be held barred.

The other cases relied upon by the Tribe similarly do not support its lack of due process argument. *Logan v. Zimmerman Brush Co.*, 102 S.Ct. 1148 (1982), does not hold that a "third party's cause of action cannot be extinguished as a result of the government's failure to fulfill its obliga-

tions." Tribe's Brief at 42. Logan's challenge was not to the government's failure to fulfill its obligations (the Fair Employment Practice Commission's error), but instead was to the " 'established state procedure' which destroy[ed] his entitlement without according him proper procedural safeguards." 102 S.Ct. at 1158. Because of that state procedure neither Logan nor anyone representing him had an opportunity to be heard.

The class action cases cited by the Tribe are similarly inapplicable. The rule in class action cases is necessarily different from the rule to be applied in trustee-beneficiary cases. Class actions were devised as a means of permitting litigation to proceed even though not all interested persons could be joined. *Hansberry v. Lee*, 311 U.S. 32, 41 (1940). The authority to represent the class springs solely from the substantial "identity of interest" shared by the named parties and the unnamed class members. Rule 23(a), Fed.R.Civ.P.; Restatement (Second) of Judgments § 42 (1)(d), comment e (1982).

The authority of the United States to represent the Tribe in *Orr Ditch* was not based upon any "identity of interest." That authority was vested in the United States as sovereign and as trustee for its Indian wards.[37] In that context, the role and the duties and obligations of the United States were analogous to those of any trustee.

Significantly, in this regard, a class representative cannot be sued for inadequate representation.[38] An exception

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[37]Its representation of an Indian tribe is much different than its representation of public interests generally. The reference in Restatement (Second) of Judgments § 42, comment f, is to those situations where an action by or against a public agency or official would bar an action by ordinary citizens or taxpayers. It has nothing to do with those situations where the United States acts as trustee for its Indian wards.

[38]Restatement (Second) of Judgments § 42, comment f at 411 (1982).

from the application of res judicata in the class action context may thus be appropriate. No similar reason for an exception to the res judicata bar can be found in the trustee-beneficiary context. A trustee can be sued for the breach of its fiduciary duty in the failure to represent a beneficiary adequately. In that context, the appropriate rule is that already adopted by this Court in *Kersh* and *Kerrison* which holds that, in the absence of fraud or collusion, a party represented by a trustee in an action is bound by the judgment in that action.

Cases involving the Sixth Amendment's guarantee of the effective assistance of counsel in criminal cases also just do not apply.[39] In the res judicata context, the trustee-beneficiary situation is analogous to those civil cases where a party is inadequately represented by an attorney. In such cases, the inadequately represented party is nonetheless bound by the result. Any different rule visits the sins of the party's lawyer upon the innocent opposition. *See Link v. Wabash R. Co.*, 370 U.S. 626, 634 n.10 (1962), and cases cited therein.

The Tribe is not denied due process if preclusive effect is given to the *Orr Ditch* Final Decree. The Tribe's true complaint is not against the *Orr Ditch* proceedings per se, it is against actions taken within the United States Government. If the Tribe did not receive adequate notice of and an opportunity to be heard on those intra-government matters, it may have rights against the United States. However, the existence of those rights neither justifies nor supports a taking of the rights vested in innocent third parties by the *Orr Ditch* Final Decree.

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[39]Wood v. Georgia, 450 U.S. 261 (1981); Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978); Von Moltke v. Gillies, 332 U.S. 708 (1948) and Glasser v. United States, 315 U.S. 60 (1942).

CONCLUSION

This case is of critical importance to Nevada and the entire arid West. Affirmance will avoid both undoing the past and creating uncertainty in the future. It will justly protect legitimate interests built up over the years in reliance on the finality of the *Orr Ditch* decree. It will assure others that reliance on other similar decrees will be protected. It will return any possible wrongs done in *Orr Ditch* to the lap of the United States government where they have always belonged. And if the past is an indication of the future, the United States will continue to respond generously to protect the Tribe, its lake and its fishery.

Respectfully submitted this 25th day of February, 1983.

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Appendix

All exhibits received in evidence in this case are listed in Volume I of the Reporters' Transcript of Proceedings at 19-150 along with references to the pages of the transcript at which each exhibit was marked, offered, admitted and/or rejected. The exhibits are not reproduced in the 27 Volume Record on Appeal.

To conform to the requirements of Sup.Ct. Rule 34.5, the following table is a list of all the exhibits to which reference is made in this Brief and the page numbers of the transcript at which they were offered in evidence and ruled on by the trial judge.

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U-491	Tr. 44	Offered	8978
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